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No. 83-1637

IN THE

Supreme Court of the United States

October Term, 1983

WILLIE L. DRAPER,

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, LOCAL 387, JESSE GREGORY, FORD MOTOR COMPANY, WOODHAVEN STAMPING PLANT, AND FRANK DOYLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF UAW LOCAL 387 AND JESSE GREGORY

MILLER, COHEN, MARTENS & SUGERMAN, P.C.
By: BRUCE A. MILLER (P17746)
(Counsel of Record)
RENATE KLASS (P29664)
2400 First National Building
Detroit, Michigan 48226
(313) 965-7540

Attorneys for Respondents UAW Local 387 and Jesse Gregory

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

WERE PETITIONER'S CLAIMS UNDER 42 U.S.C. § 1981 AND 29 U.S.C. § 185 TIME BARRED WHERE THE COMPLAINT WAS FILED MORE THAN THREE YEARS AFTER THE ALLEGED UNDERLYING EVENTS OCCURRED?

II.

HAD PETITIONER STATED A CLAIM UNDER 42 U.S.C. § 1983 WHERE THERE WAS NO ACTION ALLEGED TO HAVE BEEN TAKEN UNDER COLOR OF STATE LAW?

III.

WERE PETITIONER'S CLAIMS UNDER 29 U.S.C. § 185 AND 29 U.S.C. § 401 *ET SEQ.* PROPERLY DISMISSED WHERE PETITIONER HAD NOT EXHAUSTED INTERNAL UNION REMEDIES?

IV.

WAS PETITIONER'S CLAIM UNDER 42 U.S.C. § 1985(3) PROPERLY DISMISSED WHERE HE HAD MADE AN IDENTICAL CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e *ET SEQ.*?

V.

WAS PETITIONER'S CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e *ET SEQ.* PROPERLY DISMISSED WHERE THE CASE WAS NOT BROUGHT UNTIL OVER EIGHT YEARS AFTER THE FILING OF THE EEOC CHARGE, WHERE IN THE INTERIM CRITICAL WITNESSES HAD DIED, OTHERS HAD DISAPPEARED, RECORDS HAD BEEN DESTROYED, THE LOSS OF EVIDENCE WOULD HAVE PREJUDICED RESPONDENTS AND WHERE PETITIONER OFFERED NO JUSTIFICATION FOR HIS DELAY?

VI.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN STAYING DISCOVERY UNTIL AFTER RULING ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT?

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BRIEF IN OPPOSITION OF UAW LOCAL 387 AND JESSE GREGORY

United Automobile, Aerospace and Agricultural Workers of America, Local 387 and Jesse Gregory respectfully pray that the Court deny the Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full text publication. The opinion is set forth in Appendix E to the Petition for Writ of Certiorari. The opinion of the District Court granting the motions for summary judgment and dismissing Petitioner's complaint was issued from the bench and is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1983. The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985(3); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*; Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 *et seq.*; National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*

The complaint made no claims pursuant to the Seventh and Fourteenth Amendments of the United States Constitution and Petitioner did not appeal to the Court below the District Court's dismissal of his claims under the Thirteenth Amendment and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

STATEMENT OF THE CASE

Petitioner Willie L. Draper started this case with a complaint filed on April 19, 1982. That complaint, as subsequently amended, described approximately nineteen events which allegedly occurred in the course of Petitioner's employment with Respondent Ford Motor Company and his membership in Respondent UAW Local 387. The topics discussed consisted of an alleged inequity in overtime assignments, assault, denial of a right to speak, a car theft, violation of Roberts Rules of Order, defamatory comments, missing newspapers, luncheon breaks, harassment by fellow employees, assignments, representation, campaign literature and promotions.

Virtually all of what Petitioner brought to the District Court had been previously raised in several other forums. The same claims had been the subject of an EEOC charge filed on April 12, 1974, two 1974 NLRB charges and a lawsuit filed in 1977 in the Michigan Circuit Court for the County of Wayne. The EEOC charge was disposed of with a Notice of Right to Sue issued on February 28, 1977. (Upon Petitioner's subsequent representation that he had not received the 1977 Notice, the EEOC issued a second Notice in January, 1982). The NLRB charges were dismissed in 1974 and related appeals were denied in 1975. The state litigation was dismissed for lack of prosecution in 1979. Petitioner also initiated an internal appeal with the International Union, UAW in 1974, but let it lapse.

After filing this case in April, 1982, Petitioner was permitted to amend his complaint, which he did in October, 1982. On November 29, 1982, after repeated requests that Petitioner postpone his recently noticed

depositions until after a hearing on Respondents' motions for summary judgment, Respondents jointly moved for a protective order. The District Court then stayed discovery until after the summary judgment hearing.

Following briefing and argument the District Court granted Respondents' motions for summary judgment and dismissed the complaint on grounds of failure to state a claim, statute of limitations, failure to exhaust internal union remedies, and laches. Petitioner appealed and on December 12, 1983 the United States Court of Appeals for the Sixth Circuit affirmed the trial court in a decision not recommended for publication. (A copy is attached to the Petition as Exhibit E.)

This Petition for a Writ of Certiorari followed. The first proof of service, not signed by a member of the Bar, indicates the Petition was mailed to the Court on March 9, 1984. Respondents UAW Local 387 and Jesse Gregory believe it was received by the Court on March 12, 1984, ninety-one days after the judgment of the Court below. Respondents are further informed that the March 12, 1984 Petition was rejected for deficiencies in form. On April 4, 1984 Petitioner mailed his second Petition for Writ of Certiorari which the Court has apparently docketed effective March 12, 1984. Respondents UAW Local 387 and Jesse Gregory received the second Petition on April 5, 1984.

SUMMARY OF ARGUMENT

Certiorari should be denied. The Petition is jurisdictionally out of time, is defective in form, seeks to appeal issues not raised below, and presents no special or important reasons why this case should be reviewed.

ARGUMENT

I.

THE PETITION IS UNTIMELY

28 U.S.C. § 2101(c) provides that a petition for writ of certiorari "intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Although filing may be deemed accomplished upon mailing, this is only true where a member of the Bar of the Supreme Court submits an affidavit stating that the mailing took place within the permitted time. Sup. Ct. R. 28.2.

This Petition does not meet these jurisdictional requirements. The decree below was entered on December 12, 1983. The ninety days in which to file a petition expired on March 11, 1984. This Petition was, on information and belief, not received by the Court until March 12, 1984. No affidavit conforming to Rule 28.2 has been filed. The proof of service mailed to Respondents was neither signed by a member of the Bar nor could it have certified the mailing of the Petition as it was apparently mailed together with the Petition. Under these circumstances the Petition is jurisdictionally out of time. Sup. Ct. R. 20.3.

II.

THE PETITION IS DEFECTIVE

Rule 21 of the Supreme Court Rules sets forth the requirements for a petition for certiorari. These include a short and concise statement of the questions presented

for review, a concise statement of the case, and a direct and concise argument amplifying the reasons relied on for allowance of the writ. The Petition satisfies none of these requirements.

Petitioner's statement of questions is unintelligible and refers to matters never before raised in this case. There is no factual statement of the case. The argument consists almost entirely of a three page verbatim quotation from an opinion in an unrelated case.

Given the clear requirements of Rule 21 and Petitioner's utter failure to meet them, this Petition should be dismissed.

III.

THE PETITION SEEKS REVIEW OF ISSUES NEVER RAISED BELOW

Among the issues Petitioner tenders, there are at least three that are raised for the first time in this Court. They are:

> [W]as it "constructive contempt" by non-compliance with court's subpeona (sic), what is fair procedure?
>
> Is it "denial" of a meaningful opportunity to be heard to grant motion not in procedural compliance with rules and thereby effecting a substantial right VII Amendment to the United States Constitution?
>
> Was substantial justice rendered where affidavits were made in bad faith, no discovery or cross examination of parties making affidavits and Court asserting good faith of union?

Certainly certiorari should be denied as to these questions. Barring exceptional circumstances, certiorari should not be granted to review issues not presented to the court(s) below. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) and cases cited therein. *Cf. Lawn* v. *United States*, 355 U.S. 339, 362-63 n. 16 (1958).

IV.

THE PETITION PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

This Petition presents no special or important reasons for review of this case. Petitioner has pointed to no conflicts among the federal courts of appeal, no conflict between a federal decision and that of a state court of last resort. The Petition references no departure from the accepted and usual course of judicial proceedings or important question of federal law which has not been, but should be settled. Sup. Ct. R. 17.1.

Instead, this case presents straightforward decisions by both the District Court and the United States Court of Appeals for the Sixth Circuit in settled areas of the law.

Petitioner's claim asserted under 42 U.S.C. § 1981 was properly rejected as untimely. That claim was barred under the three year statute of limitations governing civil rights complaints brought in Michigan. *Geromette* v. *General Motors Corp.*, 609 F.2d 1200, 1201 (6th Cir. 1979). The duty of fair representation count was untimely under both the six months limitation period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) and the three year statute previously applied in the Sixth Circuit, *Gallagher* v. *Chrysler Corp.*, 613 F.2d 167 (6th Cir. 1980), *cert. denied*, 449 U.S. 841 (1980).

The duty of fair representation claim was also properly dismissed where Petitioner had failed to exhaust his UAW internal union remedies. *Clayton* v. *Int'l Union, UAW*, 451 U.S. 679 (1981); *Monroe* v. *International Union, UAW*, __ F.2d __, 115 LRRM 2475 (6th Cir. 1983). The Landrum-Griffin counts were properly dismissed on the same ground. 29 U.S.C. § 411(a)(4) *Cf. Vestal* v. *Hoffa*, 451 F.2d 706 (6th Cir. 1971); *Stelling* v. *IBEW, Local 1547*, 587 F.2d 1379 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979).

As there was no allegation that any Respondent had acted under color of state law, the claim asserted under 42 U.S.C. § 1983 was properly dismissed. *Moose Lodge No. 7* v. *Irvis*, 407 U.S. 163 (1972); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

The claim based on 42 U.S.C. § 1985(c) was also correctly dismissed. Section 1985(c) will not support a claim where the wrongful object of an alleged conspiracy is not unconstitutional and where the activity is subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. Great American Federal Savings & Loan Assoc.* v. *Novotny*, 442 U.S. 366 (1979). Petitioner's Title VII claim was correctly rejected on grounds of laches. As indicated by the lengthy transcript of the hearing on the motion for summary judgment, the District Court did not lightly apply this bar. But after considering the death and disappearance of witnesses, changed personnel, the loss of records and documents, the long delay, prejudice to the Respondents and Petitioner's failure to offer any justification for his delay, the Court did correctly apply laches here. *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975); *EEOC* v. *Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir. 1982).

Finally, the District Court was well within its discretion in staying Plaintiff's proposed discovery until after the hearing on Respondents' motions for summary judgment. Fed.R.Civ.P. 26(c)(d). Indeed, it is appropriate that preliminary issues relating to jurisdiction and legal defenses be decided before the parties embark on costly and unnecessary discovery. *Cf. Chemical and Industrial Corp.* v. *Druffel*, 301 F.2d 126 (6th Cir. 1962). Where a case can be resolved on legal issues and uncontroverted facts, justice is well served by a stay of discovery pending a decision on dispositive motions.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition filed in this matter.

Respectfully submitted,

MILLER, COHEN,
MARTENS & SUGERMAN, P.C.

By: /s/ BRUCE A. MILLER (P11746)
Counsel of Record
/s/ RENATE KLASS (P29664)
Attorneys for Respondents
UAW Local 387 and Jesse Gregory
2400 First National Building
Detroit, Michigan 48226
(313) 965-7540

Dated: May 3, 1984